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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 635.

In the Matter of
THE HIGBEE COMPANY,
Debtor.

BANKRUPTCY No. 36,119.

ROBERT R. YOUNG,
Petitioner,

vs.

JOHN P. MURPHY and
GERTRUDE BAKER BRADLEY and ALVA BRADLEY,
Executors of the Estate of Charles L. Bradley,
deceased,
Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI.

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The case which is stated in the petition and in petitioner's brief is neither the case which was presented to the courts below nor the one which is disclosed by the record. There can be no dispute as to what the facts are since substantially every important fact is made the subject of a finding by the trial court.

STATEMENT OF FACTS.

The Higbee Company, at a time when its board of directors of seven members was elected solely by the preferred stockholders (R. 40, 124), formulated and filed its Plan of Reorganization. Under the terms of the Plan the treatment of the securities owned by Bradley and Murphy

represented a compromise. (R. 67, 71, 119, 122.) The compromise was this:

The junior debt, amounting to $1,900,000 (R. 58, 103), was recognized to the extent of $600,000 only, as an obligation ahead of the preferred stock; the balance of the junior debt was compensated for in common stock at the rate of one share for each $100.00 thereof; the old common stock was surrendered for cancellation without other treatment under the Plan. (R. 122, 61, 71, 102.)

The Securities and Exchange Commission, which was a party to the proceedings, recommended its adoption as fair and feasible. (R. 96 to 129, inclusive.)

Upon submission to the creditors and stockholders, written acceptances of the Plan were filed by 87.9% of the First Preferred stockholders, 96.5% of the Second Preferred stockholders and 100% of the creditors. (R. 137-8.)

Only two stockholders (neither of whom was Petitioner Young) opposed the Plan. They prosecuted an appeal to the Circuit Court of Appeals from the order of confirmation. Their total holdings were 260 shares or 2.3% of First Preferred stock. (F.* 2, R. 272; F. 12, R. 182.)

Young, the petitioner here, was invited to join these two stockholders in their appeal from the order of confirmation. (F. 2, R. 272.) He refused to join in the appeal, assigning as his reason that he wanted Bradley and Murphy to get all that they could out of the Plan of Reorganization so that there would be that much more for him to take away from them. (F. 15, R. 182.) He consented to the Plan and agreed to be bound by its terms. (F. 32, R. 185.) He thereupon filed a claim that he, and not Bradley and Murphy, was the owner of the participation in the senior debt, the entire junior debt and all of the old common stock. (R. 198.)

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* Explanation of record abbreviations: Substantially every important fact has been made the subject of a special finding of fact by the trial court. These are referred to with the abbreviation F. Thus: F. 2, R. 272 means Finding 2, Record page 272.

While this controversy between Young and Bradley and Murphy over the ownership of the Higbee securities was pending and prior to any hearing thereon by the District Court, Petitioner Young acquired from the owners thereof the note of Bradley and Murphy in the amount of $540,000 which they had given to the Ball Foundation at the time of their purchase of claims against The Higbee Company and of all of its common stock. (F. 4, R. 272.) This note was secured by the pledge, as collateral, of the claims and securities which Bradley and Murphy had bought. (F. 3, R. 272.) The note imposed no personal liability on either Bradley or Murphy but provided for enforcement only against the collateral pledged. (F. 3, R. 272.)

Immediately upon the acquisition of the Bradley-Murphy note, Petitioner Young declared it to be due, and was on the verge of selling the collateral to himself (F. 4, R. 272; F. 44, R. 238) when Bradley and Murphy, solely for the purpose of accomplishing a dismissal of the stockholders' appeal, thus enabling them to finance payment of their note to Young, purchased the stockholdings of Potts and Boag, the only objecting stockholders. (F. 5, R. 272.) At the same time, seeking to prevent Bradley and Murphy from borrowing the funds necessary to pay their note, Petitioner Young attempted to buy from Potts and Boag these same stockholdings. (F. 5, R. 273.) It was only after considerable competition with Young that Bradley and Murphy were able on March 7, 1942 to make the purchase from Potts and Boag for $115,000, although its market value at that time was only approximately $17,000. (F. 5, R. 272-3.)

On March 9, 1942 Bradley and Murphy applied to the Circuit Court of Appeals for the dismissal of the appeal. (F. 6, R. 273.) Upon the filing of the application for dismissal Petitioner Young, in a further attempt to prevent Bradley and Murphy from paying their note and despite

his previous acceptance of the Plan of Reorganization, filed an application in the Circuit Court of Appeals for leave to intervene, to become a party to the appeal and to oppose its dismissal. In this application Young purported to act in the same precise representative capacity as in the present case. (F. 6, R. 273.)

Hearings were had in the Circuit Court of Appeals, at which Young was represented by counsel, and a full presentation was made to the court of all the facts now relied upon by Young in these present proceedings. (F. 6, R. 273.) The court, after a full hearing, dismissed the appeal and denied Young's application. No review was sought by Young of this order of dismissal. (F. 6, R. 273.)

Bradley and Murphy were thereby enabled to and did borrow $566,290.36 and paid it to Young in full satisfaction of their note, thereby preventing seizure by Young of their interests in The Higbee Company. (F. 7, R. 273.)

Thereafter, the litigation between Young on the one hand and Bradley and Murphy on the other with respect to the legal and equitable ownership of the participation in the senior debt, the entire junior debt and all of Debtor's common stock was determined in favor of Bradley and Murphy and against Young. (R. 249 to 254.) The judgment of the District Court was affirmed by the Circuit Court of Appeals (R. 255, *Young v. Bradley*, 142 F. (2) 658) and certiorari was denied by this Court on November 13th, 1944. (R. 260, 323 U. S. 775.)

The judgment in that case provided:

> "* * * Bradley and * * * Murphy are hereby found and decreed to be the legal and equitable owners of said new note[1] of The Higbee Company in the face amount of $600,000.00 and of said 14,549.9 shares of new common stock of The Higbee Company * * *. * * * The claims

[1] The note for $600,000.00 and the shares of new common stock represented the avails, under the Plan of Reorganization, of the Junior Indebtedness.

filed by Robert R. Young and Allan P. Kirby, by Frank F. Kolbe and by The Terminal and Shaker Heights Realty Company[2] to said the Higbee securities and to said new note and new common stock are hereby disallowed and dismissed." (R. 253.)

Smarting under the defeat of his several schemes to get his hands on Bradley and Murphy's holdings, Young then, on November 20, 1942, and in the same representative capacity as that in which he now claims to act, instituted a further proceeding against Bradley and Murphy and the stockholders who had sold their holdings to them. In this latter proceeding Petitioner Young charged that Bradley and Murphy knowingly participated in an unlawful scheme to purchase the stock from Potts and Boag in order to cause the dismissal of their appeal. (F. 9, R. 274.) The basis of his claim (R. 142) was precisely the same as in the instant case (R. 2), namely, that Bradley and Murphy as officers and directors of the Debtor owed the duty to refrain from any act which would prevent the determination on its merits of the appeal filed by Potts and Boag. Young then asked that Bradley and Murphy as well as Potts and Boag be required to account to the Debtor's preferred stockholders for the profit made by Potts and Boag in the sale of their stock and their appeal. (F. 9, R. 274.) This case was tried and resulted in final judgment against Young and in favor of Bradley and Murphy. (F. 10, R. 274.)

On December 1, 1942 the District Court rendered final judgment in the reorganization proceedings discharging the Debtor and fixing the rights of all creditors and stock-

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[2] The Terminal and Shaker Heights Realty Company, formerly Midamerica Corporation, did not file its claim to the Higbee securities until March 28, 1942, some two weeks after the events occurred of which Petitioner now complains. (F. 35, R. 236.) Young and his associates were in complete control of Midamerica and they themselves together with members of Young's family owned substantially all of its stock. (F. 44, R. 238.)

holders. (F. 13, R. 275.) By the terms of said decree the Court retained jurisdiction solely for the purpose of hearing and deciding three matters and three matters only. (F. 13, R. 275; R. 167.) All three of the matters in respect of which the reservation was made had been heard and finally determined before this present case was filed. (F. 13, R. 275.) Not until May 19, 1945 did Petitioner Young commence the present proceeding. (R. 2.) The Plan of Reorganization had at that time been in effect for more than three years.

This is what has happened under the Plan: Every creditor of the Debtor has been paid in full. The holder of every share of the old first preferred stock has received securities, the market value of which, at the time of trial, amounted to $244 for each old share of first preferred stock. Every holder of the old second preferred stock has received securities the market value of which, at the time of trial, amounted to $455.50 for each old share of second preferred stock. As of the date when the Plan became effective, the redemption price plus the accrual of all unpaid dividends amounted to $180.03 for each share of old first preferred and $192.26 for each share of old second preferred. (F. 14, R. 275-6.)

BRIEF.

This case does not present a factual situation where officers or directors of a corporation in reorganization have, pursuant to a plan contrived for their own benefit, obtained an advantage to themselves either at the expense or to the detriment of creditors or stockholders. The sole purpose of the purchase by Bradley and Murphy of the stockholdings of Potts and Boag, and the dismissal of their appeal, was to protect themselves against an attempted seizure by Petitioner Young of Bradley and Murphy's holdings. (F. 4, 5, 6, 7, R. 272-3.) Every creditor of the Debtor has been paid in full. Every stockholder other than Bradley

and Murphy has received much more than he would have been entitled to under liquidation. (F. 14, R. 275.) Bradley and Murphy, as owners of all of Debtor's old common stock (F. 2, R. 229; R. 243; R. 253), were entitled to all of Debtor's equity. By reason of their compromise under the Plan of Reorganization, Bradley and Murphy shared their equity with the preferred stockholders. This accounts for the preferred stockholders receiving much more than their contractual rights. (F. 14, R. 275.)

The court below held against Petitioner Young for the following reasons:

1. The Bankruptcy Court is without jurisdiction to grant the relief sought, its jurisdiction having been exhausted upon the entry of the final decree of discharge.
2. The doctrine of *res judicata* prevents the granting of the relief now sought because of three former final judgments.
3. The defense of laches.

Petitioner Young in his Statement of Facts fails to set forth the facts upon which the court below based its judgment.

This brief will discuss only three of the several grounds upon which the lower court correctly denied to Petitioner Young the relief which he now seeks.

1. The Bankruptcy Court had no jurisdiction of the subject matter presented by the petition when it was filed.

The petition was filed May 19, 1945. (R. 2.) The District Court entered its final decree of discharge on December 1, 1942. (F. 13, R. 275.) By the terms of this decree the court retained jurisdiction for the sole purpose of hearing and determining three matters, namely,

(a) the litigation then pending for the purpose of determining the ownership of the participation in the senior indebtedness, the entire junior indebted-

ness and all of the Debtor's common stock together with the disposition of the avails of the junior indebtedness under the Plan;

(b) the accounting suit then pending in which Petitioner Young sought an accounting from Bradley and Murphy and Potts and Boag as a result of the purchase by Bradley and Murphy of the Potts-Boag stockholdings and the dismissal of their appeal;

(c) the allowance of compensation and other fees. (F. 13, R. 275; R. 167.)

The first matter in respect of which reservation of jurisdiction was made is defined in Section V, subparagraph (a) of the final decree of discharge. (R. 167.) The petitioner does not quote enough of the final decree to make its meaning understood. The entire clause describing the first of these three matters is as follows (R. 167):

"V. That this Court hereby retains jurisdiction of the proceedings in this cause solely for the purpose of hearing and determining the following matters:

(a) The litigation now pending in these proceedings and in respect of which the Special Master has heretofore filed his Ad Interim Report, and which will determine the ownership of the new note and the new common stock of the Debtor applicable to its so-called Junior Indebtedness and the proceeds of the participation in the Senior Bank Indebtedness of the Debtor held by J. P. Morgan & Company, New York City, applicable to the owner of the Junior Indebtedness, pursuant to paragraph 7 of the order entered herein by the Special Master on April 18, 1942, together with any and all matters relating to said new note, said new common stock and said participation in said proceeds, including the escrow with The Cleveland Trust Company established by order entered on August 21, 1942, but nothing herein contained shall constitute a confirmation or modification of said Ad Interim Report, jurisdiction to pass upon the same being hereby expressly reserved;"

What has happened to "the litigation now pending in these proceedings"? On March 16, 1943 the District Court entered its final judgment. The Circuit Court of Appeals thereafter affirmed the trial court and certiorari was denied by this Court on November 13, 1944. (F. 8, R. 273-4.) The judgment so rendered determined Bradley and Murphy to be the "legal and equitable owners of" the indebtedness and securities described in the reservation. (R. 253.) The "new note and said new common stock and said participation in said proceeds" were ordered to be delivered by The Cleveland Trust Company as Escrow Agent to Bradley and Murphy. (R. 253.) By reason of its compliance with the judgment the Escrow Agent has been discharged. (F. 8, R. 273-4; R. 254.)

It is obvious, therefore, that the trial court was correct in its finding (F. 13, R. 275) that the first matter reserved by the decree was "finally disposed of" on November 13, 1944. (F. 8, R. 273-4.)

The second matter reserved by the court in its final decree of discharge was the application referred to in Findings 9 and 10 of the District Court (R. 274) which involved the proceedings wherein Young, as a representative of preferred stockholders, sought to hold Potts and Boag and Bradley and Murphy accountable for what Bradley and Murphy paid to purchase the Potts-Boag stockholdings and the right to dismiss the appeal. In those proceedings the District Court rendered final judgment in favor of Bradley and Murphy. That judgment was affirmed by the Circuit Court of Appeals and no effort was made to secure its reversal in so far as it related to Bradley and Murphy. (F. 10, R. 274-5.) Petitioner Young certainly cannot contend that the present proceedings are the same. If he does he must admit the bar of *res judicata*.

The third subject of reservation related to the allowance of counsel fees which according to the findings of the trial court have been finally disposed of. (F. 13, R. 275.)

In an effort to avoid the effect of the decree of discharge, Petitioner Young in the court below relied on the language of this Court in *Young vs. Higbee, et al.*, 324 U. S. 204, 214. It was there said that the District Court had jurisdiction to enforce an accounting against Potts and Boag "both because of its express reservation and because of the provisions of Section 222." (Chandler Act.)

In the present case there is no express reservation which covers this proceeding.

The provisions of Section 222 of the Chandler Act (11 U. S. C. § 622) can be of no help to petitioner in the present case. As this Court stated in *Young v. Higbee Company, et al., supra*, at p. 214, "This section gives the Judge power, under conditions applicable here, to alter and modify a reorganization plan even after confirmation." Turning to this section of the Chandler Act, the significance of the word "confirmation" becomes apparent. It does authorize action after "confirmation." It does not authorize any action after a final decree of discharge.

Provision for the final decree of discharge, which is the decree described in Finding 13, R. 275, is found in Section 228 of the Chandler Act (11 U. S. C. § 628). This section was taken from former Section 207(b) of the Bankruptcy Act. It is there provided:

> "Upon the consummation of the plan, the Judge shall enter a final decree—(1) discharging the Debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the Debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property; (2) discharging the trustee, if any; (3) making such provision by way of injunction or otherwise as may be equitable; and (4) closing the estate."

The final decree of discharge complied precisely with this provision of the statute. (R. 165-167.)

Wherever the matter has been presented to the Federal Courts it has been uniformly held that after a plan of reorganization has been confirmed and the final decree has been entered closing the estate of the Debtor, with all matters reserved therein finally disposed of, the cause may not be reopened. *In re Peyton Realty Co.*, 148 F. 2d 771 (C. C. A. 3, 1945); *In re Wedgewood Hotel Co.*, 125 F. 2d 327 (C. C. A. 7, 1942); *In re Corona Radio & Television Corp.*, 102 F. 2d 959 (C. C. A. 7, 1939); *In re Argyle-Lake Shore Corp.*, 98 F. 2d 372 (C. C. A. 7, 1938). See *Prudence Corp. v. Ferris*, 323 U. S. 650, 654.

Although not an essential element to a determination of the jurisdictional question, it must be borne in mind that to grant the relief sought by Petitioner Young would constitute a complete modification of the Plan of Reorganization and a repudiation of the compromise which both the Securities and Exchange Commission and the Bankruptcy Court found to be indispensable in arriving at a fair and feasible plan. (R. 67, 68, 119.)

2. Petitioner Young and the class which he claims to represent are barred by the doctrine of res judicata by reason of the judgment which determined that Bradley and Murphy were not only the legal but also the equitable owners of the Higbee securities.

Petitioner Young asserts (pp. 2, 3 and 10 of his petition) that, by securing the dismissal of the Potts-Boag appeal, Bradley and Murphy thereby caused confirmation of the Plan of Reorganization under which they forthwith secured the Higbee securities. This is not true. The Plan itself (R. 58-9) recognizes Bradley and Murphy as two of a number of claimants to the Junior Indebtedness. Following the confirmation of the Plan several other claimants, including Petitioner Young, asserted ownership to them. Petitioner Young's controlled company, Midamerica, and others filed their claims to these securities after the

dismissal by the Circuit Court of Appeals of the so-called Potts-Boag appeal. (R. 203.) The Bankruptcy Court did not determine that Bradley and Murphy were "the legal and equitable owners" of the Higbee securities until March 16, 1943. (F. 8, R. 273-4.) The judgment, however, determining Bradley and Murphy to be the legal and equitable owners of the Higbee securities was affirmed by the Circuit Court of Appeals and a petition for writ of certiorari was denied by this Court. (F. 8, R. 274.)

All stockholders, including that class which petitioner now claims to represent, were, by operation of law and in fact, parties to the bankruptcy proceedings. Therefore, the judgment of the Bankruptcy Court determining that Bradley and Murphy were the "legal and equitable owners" of the Higbee securities and the avails thereof under the Plan of Reorganization clearly bars by way of *res judicata* all stockholders or other claimants in the bankruptcy proceedings from asserting any other claim to legal or equitable ownership of the Higbee securities. *Prudence Corp. v. Ferris,* 323 U. S. 650, 654; *Chicot County District v. Bank,* 308 U. S. 371; *Stoll v. Gottlieb,* 305 U. S. 165. As stated on page 378 of the opinion by Mr. Chief Justice Hughes in *Chicot County District v. Bank, supra*:

> "The remaining question is simply whether respondents, having failed to raise the question in the proceedings to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well settled principle that *res judicata* may be pleaded as a bar not only as respects matters actually presented to sustain or defeat the rights asserted in the earlier proceeding 'but also as respects any other available matter which might have been presented to that end.' "

3. Petitioner Young and the class which he claims to represent are barred by the doctrine of res judicata by reason of the judgment against him and his class and in favor of Bradley and Murphy determining that Bradley and Murphy were not accountable to the Debtor or its preferred stockholders because of their purchase from Potts and Boag of the dismissal of the appeal.

The present case constitutes a second attempt which Petitioner Young, purporting to act for the same class, has made to require an accounting from Bradley and Murphy on the ground that their purchase of the Potts-Boag stock holdings and the consequent dismissal of the appeal was "a wrongful transaction in violation of the rights of the other Higbee stockholders." (R. 3, F. 9; R. 274.)

The prior attempt ended in the decision of the Circuit Court of Appeals affirming the judgment of the District Court in favor of Bradley and Murphy. (F. 10; R. 274.) Although Petitioner Young took an appeal to the Supreme Court from that judgment in so far as it related to Potts and Boag, he sought no review of the judgment in favor of Bradley and Murphy. (F. 10, R. 274.)

That the issues raised in the prior proceeding were identical with those raised in the present one is clearly apparent from a comparison of the petition in the earlier proceeding (R. 142) with the petition in the present case. (R. 2.)

The mere fact, that in one instance petitioner sought to require Bradley and Murphy to account for money they had already paid and in the other to require them to account for property and money they had received as a result of the same alleged conduct, does not prevent the operation of the doctrine of *res judicata*. The fact that a different form or measure of relief is asked in the later suit does not deprive the defendants of the protection of

the prior findings and decree in their favor. *Green v. Bogue,* 158 U. S. 478; *Baird v. U. S.*, 96 U. S. 430.

Petitioner's "Reasons for Allowance of the Writ."

Petitioner makes the contention (p. 7 of his petition) that "the decision of the lower courts in this case permits corporate officers to advance their own personal interests at the expense of the stockholders * * *." This statement is not true.

The Debtor, at a time when its board of directors had been elected solely by its preferred stockholders (R. 40, 124), formulated and filed its Plan of Reorganization by the terms of which the treatment of the "Higbee securities" then claimed to be owned by Bradley and Murphy, represented a compromise. (R. 67, 71, 119, 122.) This compromise consisted of Bradley and Murphy consenting that the junior debt (amounting to approximately $1,900,000) be recognized to the extent of $600,000 only as an obligation ahead of the preferred stock, and the balance thereof behind the preferred stock. (R. 58, 103, 122.) The compromise also included the surrender by Bradley and Murphy of all rights and claims as the holders of all of Debtor's common stock. (R. 61, 71, 102.) The ownership by Bradley and Murphy of all of the old common stock of Debtor (F. 2, R. 229; R. 243; R. 253) was not contested in the so-called Potts-Boag appeal. (R. 48 *et seq.*) The Debtor was never adjudicated insolvent. (R. 73.)

Under the Bankruptcy statutes the Court must be satisfied that a plan of reorganization is "fair and equitable" (11 U. S. C. § 621), and that it provides common stockholders with "adequate protection for the realization by them of the value of their equity" unless the Judge determines (which did not happen in this case) that the Debtor is insolvent. 11 U. S. C. § 616 (8). The determination of these questions usually "requires a prediction as

to what will occur in the future" only because "an estimate as distinguished from mathematical certitude is all that can be made." *Consolidated Rock Co. v. DuBois,* 312 U. S. 510, 526. However, in this case "a prediction as to what will occur in the future" is not required, since the value of the Debtor's property can be determined with "mathematical certitude."

The Plan of Reorganization which has now been in effect for more than five years provided for participation in the equity of the Debtor by the preferred stockholders whom Petitioner Young claims to represent. (R. 59, 60.) As a result, both old first and second preferred stockholders received securities, under the Plan, which were at the time of the trial of this case worth much more than their holdings could ever have amounted to if the Debtor had not gone into bankruptcy. (F. 14, R. 275.) All of the creditors were paid in full. (F. 14, R. 275.) Bradley and Murphy, however, did not realize the value of their equity as owners of all of the common stock of the Debtor because by reason of their compromise they shared this equity with the preferred stockholders.

It can, therefore, now be said with "mathematical certitude" that, by their purchase of the Potts-Boag appeal, Bradley and Murphy made possible the confirmation of a plan of reorganization under which they received less than a "realization by them of the value of their equity" while all other stockholders received much more. In other words, instead of corporate officers in this case having benefited their personal interests at the expense of stockholders, the stockholders' interests were actually enhanced at the expense of the corporate officers.

Respectfully submitted,

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